MALITE SDN. BHD. v. ABDUL KARIM BIN GENDUT & ORS.

[F.C. (Suffian L.P., Salleh Abas & Abdul Hamid F.JJ.) January 15 & February 21, 1981]

[Kuala Lumpur — Federal Court Civil Appeal Nos. 211 & 212 of 1981]

Practice and Procedure — Application to add co-plaintiff and amend statement of claim — Delay in making application — Desirability of having all parties before Court — Removal of private caveat — R.H.C. 1980, O. 15 r. 6(2).

Practice and Procedure — Costs — Successful appellants to pay costs of appeal and proceedings in court below.

In this case the appellants sued the respondents in respect of a piece of land originally owned by the third respondent. It was alleged that the first respondent acting as the agent of the appellants had accepted an offer of sale from the third respondent. Subsequently the third respondent caused the land to be transferred to the second respondent. The defence of the respondents was that the land was offered to a company which was not the same as the appellants. In order to protect their interests the appellants caused a private caveat to be entered against the land. They subsequently applied to extend the caveat till the disposal of the civil suit. Four days before the trial the appellants applied to add another company as co-plaintiff and to amend certain parts of the statement of claim. Wan Hamzah J. refused the application and also ordered the removal of the caveat. The appellants appealed.

Held, allowing the appeal: (1) as the trial of the suit was still pending the caveat should not have been removed;

(2) this was a proper case in which the court should exercise its discretion under Order 15 rule 6(2) mindful of the principle that all parties ought to be before the court so that their rights and liabilities can be determined in one action instead of in several.

Cases referred to:-

(1) *Byrne* v. *Brown* (1889) 22 Q.B.D. 666, 667.

(2) *Van Gelder* v. *Sowerby Bridge Society* (1890) 44 Ch. D. 374, 394.

(3) *Montgomery* v. *Foy* [1895] 2 Q.B. 321, 324.

FEDERAL COURT.

Paramjit Singh Gill for the appellants.

Abdul Rahim Noor for the 1st and 2nd respondents.

R. Rajeswaran for the 3rd respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): The appellants, Malite Sdn. Bhd. sued all three respondents on February 8, 1977. The first and second respondents duly filed in their defence on May 4, 1977, whilst the third respondent on April 1, 1977. The pleadings were closed and the appellants filed entry for trial on October 15, 1977 and on July 18, 1978 the appellants changed their solicitors.

The subject-matter of the suit between the parties (K.L.C.S. No. 337/1977) is a piece of land held under document of title, Q.T.(R) 58 P.T. 45 Tapak Perusahaan Shah Alam. The land was originally owned by the third respondent. The appellants alleged that the first respondent acting as their agent and trustee accepted the offer of sale of the said land from the third respondent and that thereafter in breach of the trust caused the third respondent to transfer it to the second respondent. The purchase price was $135,000 of which $61,090.80 was paid by the appellants. The appellants claimed damages against the first and third respondents and re-transfer of the land to themselves against the second respondent. The defence of the three respondents is that the appellants are not the same company as the one for whom the first respondent acted and to whom the third respondent offered to sell the land in question. It is their defence that the land was offered for sale to a joint-venture company, yet to be formed of which the first respondent was to have 51% interests and for which he acted. The formation of this company was not approved by the Registrar of Companies and so the first respondent incorporated the second respondent as the successor to the said abortive joint-venture company and the land offered for sale by the third respondent was subsequently transferred to this newly incorporated company (the second respondent). The respondents claim therefore that the appellants are a complete stranger to the land transaction.

Meanwhile in order to protect their interests the appellants caused a private caveat to be entered against the land (Private Caveat Registration No. 27 of 1976, Jilid 2, Folio 50). The entry was made on July 9, 1976 and by the court's order dated July 24, 1978 the caveat was extended for a period of two years till July 24, 1980 and thereafter to such further period as when the civil suit between the parties shall have finally been determined.

Since entry for trial on October 15, 1977 until May 10, 1980 the civil suit remained dormant, whilst the land continued to be caveated for the benefit of the appellants, and much against the interests of the respondents No. (1) and No. (2). They thus applied on May 10, 1980 by summons-in-chambers for an order of early trial. To counter this move the appellants made an application for extension of the caveat whilst the respondents made a counter application to have the caveat removed. It is not understood why the appellants who already had their caveat extended to the date of the disposal of the civil suit, should again apply for the same extension. It could only be inferred that the appellants were more interested in perpetuating the caveat than in early settlement of the dispute. Whatever it may be, on July 21, 1980 Wan Hamzah J. ordered the extension of the caveat in term similar to that made by the court on July 24, 1978. He also made a consent order that the suit be tried on August 20 and 22, 1980.

So far so good. However, on August 20, 1980, when the suit was to be tried, the appellants moved the court by notice of motion filed four days earlier (August 16, 1980) for permission to add Seng Hup Electric Co. Sdn. Bhd. of No. 44-2 and 44-3 Jalan Treacher, Kuala Lumpur (herein referred to as Seng Hup) as a co-plaintiff and to amend certain parts of the statement of claim. The application was strenuously opposed by the respondents. Finally Wan Hamzah J. probably annoyed (incensed) by this last minute move, did not only reject the application to add Seng Hup as a co-plaintiff and to amend the statement of claim, but also made an order for the removal of the caveat. It is from the decision of the learned judge on the appellants' notice of motion and his order removing the caveat, that the appellants now appeal to us.

As to the removal of the caveat, it is clear that on July 24, 1978 and again on July 21, 1980 the caveat was extended until the determination of the civil suit. The rejection of the appellants' application to add a co-plaintiff and to amend the statement of claim does not mean that the suit is determined. Its trial is still to go on. The purpose of the caveat is to protect the interests of the appellants who would otherwise be without protection should the civil suit be determined in their favour. The conduct of the appellants may well show that they are more interested in the continuance of the caveat, than in speedy disposal of their civil suit in that they took no step at all to stir up the litigation, which remained inactive since July 1978. Seeing that they had no ground to oppose the respondents' application for an early trial they once again applied for the extension of the caveat, though this was in fact already given to them, and having obtained the extension twice over on the date of trial they placed further impediments to speedy trial by making an application to add a co-plaintiff and to amend the statement of claim. In our view however much we disapprove of the appellants' conduct this should go only towards costs. It is certainly not a ground to order the removal of the caveat, as the trial of the suit is still pending.

We now come to the appellants' application to add a co-plaintiff and to amend the statement of claim. Counsel for the appellants submitted that since the respondents' defence is that the appellants are a stranger to the offer and purchase of the land it is necessary that Seng Hup should be joined as a co-plaintiff. It is Seng Hup who made the application to purchase the land from the third respondent and it was Seng Hup also who made part payments for the price and to whom the receipts were issued by the 3rd respondent. The proposed amendment of the statement of claim alleges that Seng Hup applied to buy the land and that they appointed the first respondent to act on their behalf for the purpose of completing the purchase and that they had accordingly informed the 3rd respondent. Nothing however is said of the relationship between the appellants and the proposed co-plaintiff, but from the affidavits filed in these cases, it appears that the two directors of Seng Hup, namely Teo Bak Seng and Teo Seng Hua are the promoters, and possibly the directors of the appellants as well, and so Seng Hup and the appellants are associate companies having common directors. In his grounds of decision the learned judge gave three reasons why he dismissed the appellants' application.

These are: —

(i) the proposed amendment is contrary to the statement in the affidavits of Teo Seng Hua sworn on July 18, 1978 which statement was used to support application for the extension of the caveat;

(ii) the appellants are guilty of negligence by failing to instruct their solicitors much earlier, and the present application, if allowed, would further delay the trial and hence prejudice the respondents; and

(iii) the dismissal of the application would not cause any injustice to Seng Hup as they can bring their own action separately against the respondents at any time.

The pleadings of this civil suit raise the issue as to whom the 3rd respondent was making its offer of sale of the lands in question and what condition must be fulfilled by the buyer before the sale could go through. Was the offer made to the promoters of appellants or to Seng Hup Electric Co. Sdn. Bhd. or to the promoters of a joint-venture company, whose formation did not receive the approval of the Registrar of Companies? These facts could only be ascertained after a proper trial, in which witnesses will be subject to examinations and cross-examinations. Leaving out Seng Hup would not lead to a complete determination and adjudication of the matter pertaining to the sale and purchase of this land. We therefore feel that this is a proper case in which the court should exercise its discretion under Order 15 rule 6(2), mindful of the principle that all parties ought to be brought before the court so that their rights and liabilities may be determined in one action instead of in several: *Byrne* v. *Brown.*[1] See also Bowen L.J. in *Van Gelder* v. *Sowerby Bridge Society*[2] and Lord Esher M.R. in *Montgomery* v. *Foy.*[3]

Regarding the affidavits of Teo Seng Hua being contrary to the proposed amendment of the statement of claim, we are of the view that this is a matter which should not concern the court at the present juncture as this evidence was not subject to the test of cross-examinations. If the appellants make the application which is contrary to their evidence, it is a matter for them to bear the consequence of such contradiction.

The delay in making the application for the amendment should therefore only go towards costs.

Hence our conclusion is that the decision of the learned judge is reversed and the appeal is therefore allowed but the appellants have to pay the costs of this appeal and the proceedings in the court below.

Appeal allowed.

Solicitors: *Gill & Tang; Maxwell, Kenion, Cowdy & Jones; Shook Lin & Bok.*

EAST ASIATIC CO. LTD. v. MALAYSIAN INTERNATIONAL MERCHANT BANKERS BHD.

[F.C. (Suffian L.P., Chang Min Tat & Syed Othman F.JJ.) December 8, 1980 & February 28, 1981]

[Kuala Lumpur — Federal Court Civil Appeal No. 239 of 1979]

Practice and Procedure — Appeal to Yang di-Pertuan Agong — Interpleader — Summons — Summary decision — Leave required for appeal — R.S.C. 1957, O. 54 r. 23, O. 57 rr. 8, 9 & 11 — Courts of Judicature Act, 1964, ss. 68(3) & 74(1).

In this case Wiggins Teape (M) Sdn. Bhd. obtained judgment against Bahagia Trading Sdn. Bhd.* and issued a writ of execution. Objection to the seizure of machinery including a Hiedelberg offset printing machine was lodged by several companies, including the appellants and the respondents. An interpleader summons was taken out to resolve the dispute. The interpleader summons was heard by the Senior Assistant Registrar who decided in favour of the respondents and dismissed the claim of the appellants. On appeal, the learned judge held that the machine was so affixed to the ground that it had become a fixture and therefore formed part of the

* See [1980] 2 M.L.J. 45.